

# EXHIBIT “A”

## GENERAL INFORMATION

**Election to Proceed under the Alabama Rules for Expedited Civil Actions:** ☐ YES ☐ NO

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DOUGLAS KILLOUGH, KIMBERLY  
KILLOUGH, and CHRISTIANA  
KILLOUGH

Plaintiffs,

v.

FIVE GUYS OPERATIONS, LLC,

Defendant.

Case No.: \_\_\_\_\_

JURY TRIAL DEMANDED

**COMPLAINT**

Plaintiffs Doug Killough, Kimberly Killough, and Christiana Killough file this Complaint against Five Guys Operations, LLC and states as follows:

**PARTIES**

1. Plaintiff Doug Killough is an individual who lives in Madison County, Alabama.
2. Plaintiff Kimberly Killough is an individual who lives in Madison County, Alabama.
3. Plaintiff Christiana “Chrissy” Killough is an individual who lives in Madison County, Alabama. She is nineteen years old.
4. Defendant Five Guys Operations, LLC (“Five Guys”) is a Delaware limited liability company that does business in Jefferson County, Alabama.

**JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over this action pursuant to Ala. Code §§ 12-11-30 and 12-11-31 because Killough is seeking an amount that exceeds \$20,000.

6. Venue is proper in Jefferson County pursuant to Ala. Code § 6-3-6 because Five Guys does business in Jefferson County through its Fultondale franchise location. A substantial part of the events that give rise to Killough's claims also occurred in Jefferson County.

### **STATEMENT OF FACTS**

7. On April 22, 2021, Mr. Killough drove with his daughter Chrissy from their home in Huntsville, Alabama to the University of Montevallo in Montevallo, Alabama to attend a high school track meet.

8. They left Huntsville at around 5:15 AM, and they stopped for breakfast in Falkville, Alabama.

9. Chrissy competed in six events at the track meet, and while she was physically tired after the meet, she did not feel sick.

10. When the meet was over, Mr. Killough, Chrissy, and other students and families began driving back to Huntsville.

11. On their way back, Mr. Killough, Chrissy, and a few others stopped at the Five Guys restaurant located on Lowery Parkway, in Fultondale, Alabama around 3:30 PM.

12. Five Guys Operations, LLC owns and operates this franchise.

13. Mr. Killough and Chrissy both ordered and ate a hamburger and fries.

14. Prior to eating at Five Guys, neither Mr. Killough nor Chrissy had eaten anything since they stopped for breakfast, and neither had, to that point, suffered any gastrointestinal issues.

15. By the time they arrived home, Mr. Killough and Chrissy both felt nauseated and did not eat anything for dinner.

16. Later that evening, both Mr. Killough and Chrissy became very ill and started vomiting because of the food that they ate at Five Guys.

17. They later learned that another student who ate a Five Guys with them also got sick. This student did not eat breakfast with Mr. Killough and Chrissy.

18. Mr. Killough and Chrissy both continued vomiting for hours, and at one point, Kimberly Killough—Mr. Killough's wife—found Mr. Killough on the bathroom floor complaining of extreme pain and struggling to talk.

19. Mr. Killough told his wife that he felt like he had ripped something while violently throwing up.

20. Shortly before midnight, Mrs. Killough called an ambulance for Mr. Killough. When the ambulance arrived, Mr. Killough was still vomiting and in extreme pain, so the firemen and EMTs put him in the ambulance and transported him to Huntsville Hospital.

21. At the hospital, Mr. Killough was eventually diagnosed with Boerhaave syndrome, or a perforation of the esophagus. Because he continued vomiting after tearing his esophagus, vomit entered his chest cavity and, among other things, caused one of his lungs to deflate.

22. His injury was so serious that it required imminent surgery.

23. Prior to surgery, the cardiothoracic surgeon spoke with Mrs. Killough and told her that Mr. Killough's diagnosis had a high mortality rate and that even with surgical intervention, the risk of death for Mr. Killough was significant.

24. The surgeon suggested that Mrs. Killough say goodbye to her husband in case he did not survive the procedure. During this time, Mr. Killough was unconscious.

25. On the Morning of April 23, Mr. Killough underwent a thoracotomy to remove the vomit and partially digested food that was in his chest cavity, repair the hole in his esophagus, and otherwise attempt to mitigate his injuries.

26. Mr. Killough remained in the hospital until May 5, 2021.

27. Mr. Killough had to be readmitted to the hospital on May 11, 2021 to treat a small perforation that had formed in his esophagus after the initial procedure and that resulted in an infection. He stayed in the hospital until May 25, 2021.

28. Over the next eleven months, Mr. Killough underwent approximately fourteen procedures. Most the procedures were necessitated by scar tissue at the surgical site shrinking closed.

29. Because of the scar tissue, Mr. Killough's esophagus was very narrow, and he struggled to eat and drink.

30. After the initial procedure, Mr. Killough was on a liquid diet and was unable to eat solid foods. After a few months, Killough was able to reintroduce soft foods.

31. However, Mr. Killough's progress was halting. As he attempted to reintroduce soft or solid foods, he would frequently vomit those foods back up because he was unable to swallow them.

32. After several months, Mr. Killough was finally able to resume a normal diet, but he still has to pace himself and eat in small bites.

33. Beyond his diet, Mr. Killough lost a significant amount of weight and was unable to carry on a normal life for several months. As of late June 2021, he had to use a walker to move around his home.

34. Mr. Killough's medical bills have greatly exceeded \$500,000, and he will likely need future treatments.

35. Mr. Killough also suffered a loss of income because he was unable to work for several months after his injuries.



36. Mr. Killough is self-employed at his company, Technical Consulting Solutions, Inc. (“TCS”).

37. TCS is an engineering consulting firm that provides skilled labor—i.e., engineers—to large government contractors.

38. Typically, TCS enters into contracts with government contractors and provides engineers who bill their time at an hourly rate.

39. In addition to managing TCS, Mr. Killough also personally works as an engineer for TCS’s clients. When he provides these services, he works at the government contractor’s location and bills his time on an hourly basis.

40. From April 26, 2021 through December 31, 2021, TCS had 1368 billable hours available from its customers that Mr. Killough could have worked but was unable to because of his injuries.

41. From January 1, 2022 through January 28, 2022, TCS had 177 billable hours available from its customers that Mr. Killough could have worked but was unable to because of his injuries.

42. In total, Mr. Killough and TCS lost out on over \$241,000 in income because Mr. Killough was unable to work and bill the available hours.

43. Mrs. Killough likewise suffered a loss of consortium because of Mr. Killough’s injury. Because of his stay in the hospital and prolonged recovery, Mr. Killough was unable to provide his usual comfort, care, and support for Mrs. Killough.

44. Chrissy Killough did not suffer from Boerhaav Syndrome, but the food that she ate at Five Guys still caused her to become very ill. She vomited extensively, and for days after, she had very little energy and was unable to engage in many activities.

45. Specifically, Chrissy missed school for the rest of the week. Her prom was scheduled for the following Saturday, and she was unable to attend the dinner beforehand. At the prom itself, Chrissy was still physically weak and unable to participate much.

**COUNT I (AEMLD)<sup>1</sup>**

46. The Killoughs incorporate the allegations in paragraphs 1–45.

47. Five Guys served Mr. Killough and Chrissy food that was defective and unreasonably dangerous because it caused them to become extremely ill.

48. The food was contaminated in some way because it caused three people to get sick after eating it, and as a result, it was unfit for human consumption.

49. Mr. Killough and Chrissy had a reasonable expectation that their food would not be contaminated and that their food would not cause them to violently vomit.

50. Mr. Killough and Chrissy both suffered an illness proximately caused by eating food prepared and served by Five Guys.

51. Mr. Killough suffered severe injuries as a proximate cause of his food-induced illness.

52. Specifically, Five Guys's food caused Mr. Killough to violently vomit, which led to a perforated esophagus. Mr. Killough had to undergo intensive surgery because of his perforated esophagus and the resulting injuries and infection.

53. The food that Mr. Killough ate at Five Guys was the direct cause of his illness and injuries.

54. The food that Chrissy ate at a Five Guys was the direct cause of her illness.

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<sup>1</sup> This claim is brought by Mr. Killough and Chrissy.



55. Mr. Killough and Chrissy suffered symptoms consistent with a foodborne illness—namely nausea and vomiting.

56. Another student on the track team ate at Five Guys and suffered similar symptoms around the same time.

57. Neither Mr. Killough nor Chrissy had not eaten for approximately ten hours before they ate at Five Guys, and neither suffered any gastrointestinal distress prior to eating at Five Guys. In fact, Chrissy competed in a track meet and felt fine all day until after she ate at Five Guys.

58. Mr. Killough's medical records note that he had "suspected gastroenteritis/food poisoning."

59. Mr. Killough's injuries caused him to incur significant medical expenses and lost income, and he also suffered physical pain, emotional distress, and mental anguish.

60. Chrissy's illness caused her to suffer physical pain, emotional distress, and mental anguish.

Mr. Killough and Chrissy therefore request that the Court enter judgment against Five Guys for compensatory, special, and punitive damages and all other appropriate relief.

## **COUNT II (NEGLIGENCE)<sup>2</sup>**

61. The Killoughs incorporate the allegations in paragraphs 1–45.

62. Five Guys had a duty to serve food that was fit for human consumption and was not unreasonably dangerous.

63. Five Guys also had a duty to exercise reasonable care in the selection and preparation of food that it served.

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<sup>2</sup> This claim is brought by Mr. Killough and Chrissy.

64. Five Guys breached this duty by serving food that it reasonably should have known was not fit for human consumption and was unreasonably dangerous.

65. Further, three different people who ate the same or similar food prepared by Five Guys—Mr. Killough, Chrissy, and another student—all got sick within the same timeframe.

66. They all consumed this food at or around the same time, and they all got sick shortly after.

67. These circumstances, at a minimum, raise the presumption of negligence under the doctrine of *res ipsa loquitur* or another similar doctrine.

68. Mr. Killough suffered injuries and damages as a result of eating negligently prepared food. Specifically, he became violently ill and suffered a torn esophagus, which resulted in severe injuries.

69. Chrissy also suffered from illness as a result of eating negligently prepared food. Specifically, he became very ill and vomited extensively.

70. Mr. Killough and Chrissy's injuries were a foreseeable result of Five Guys's breach of its duty to exercise reasonable care in the selection, preparation, and service of its food.

71. Mr. Killough and Chrissy suffered physical, emotional, mental, and financial injuries as a result of Five Guys's negligent acts.

Mr. Killough and Chrissy therefore request that the Court enter judgment against Five Guys for compensatory, special, and punitive damages and all other appropriate relief. Mr. Killough specifically requests damages for his pain and suffering, emotional distress, and mental anguish.

### **COUNT III (BREACH OF IMPLIED WARRANTIES)<sup>3</sup>**

72. The Killoughs incorporate the allegations in paragraphs 1–45.

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<sup>3</sup> This claim is brought by Mr. Killough and Chrissy.

73. Mr. Killough and Five Guys entered into an agreement for the purchase and sale of goods—specifically, food.

74. Under Ala. Code §§ 7-2-314 and 7-2-315, the food came with an implied warranty of merchantability and implied warranty of fitness for particular purpose because Five Guys did not exclude or modify these implied warranties.

75. The ordinary purpose for the food that Five Guys sold was consumption at or around the time of purchase with no further preparation required.

76. Five Guys knew that Mr. Killough and Chrissy intended to eat the food at that time in the Five Guys store because they ordered the food “for here.”

77. The food was not fit for consumption at that time because it caused, within a relatively short time, both Mr. Killough and Chrissy to become ill.

78. Similarly, another student eating at Five Guys at the same time became ill after eating food prepared and sold by Five Guys.

79. The food therefore breached by the implied warranty of merchantability and implied warranty of fitness for a particular purpose.

80. Because they consumed the unmerchantable and unfit food, Mr. Killough and Chrissy suffered damages in the form of financial loss for payment of the food, physical injuries, emotional and mental injuries, and financial loss because of inability to work.

Mr. Killough and Chrissy therefore request that the Court enter judgment against Five Guys for compensatory, consequential, and incidental damages and all other appropriate relief.

#### **COUNT IV (LOSS OF CONSORTIUM)<sup>4</sup>**

81. The Killoughs incorporate the allegations in paragraphs 1–45.

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<sup>4</sup> This claim is brought by Mrs. Killough.

82. Kimberly Killough is married to Doug Killough.

83. Mr. Killough suffered physical injuries as a result of Five Guys's negligence and sale of defective and unreasonably dangerous food.

84. Mr. Killough's physical injuries caused him to be hospitalized for an extended period of time, and even after that, Mr. Killough was limited in his physical activity and ability to engage in his normal day-to-day activities.

85. Because of his prolonged physical limitations, Mr. Killough was unable to provide his usual love, company, fellowship, cooperation, assistance, society, affection, services, and comfort for his wife.

86. Thus, Mrs. Killough suffered a loss of consortium during Mr. Killough's hospitalization and recovery.

Mrs. Killough therefore requests an award of damages to be determined by a jury.

**PLAINTIFFS DEMAND A JURY ON ALL CLAIMS.**

This the 29<sup>th</sup> day of March, 2023.

Respectfully submitted,

/s/ Sam David Knight

Sam David Knight (KNI023)

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BADHAM & BUCK, LLC

2001 Park Place North, Ste. 500

Birmingham, Alabama 35203

(205) 521-0036 (Phone)

(205) 521-0037 (Facsimile)

**PLEASE SERVE THE DEFENDANT VIA CERTIFIED MAIL AT THE FOLLOWING ADDRESS:**

FIVE GUYS OPERATIONS, LLC  
c/o C T Corporation System, Registered Agent  
2 North Jackson Street, Suite 605  
Montgomery, Alabama 36104

State of Alabama Unified Judicial System Form C-34 Rev. 4/2017	<b>SUMMONS</b> <b>- CIVIL -</b>	<b>Court Case Number</b> 01-CV-2023-901005.00
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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA**  
**DOUGLAS KILLOUGH ET AL V. FIVE GUYS OPERATIONS, LLC**

**NOTICE TO:** FIVE GUYS OPERATIONS, LLC, C/O CT CORPORATION 2 N. JACKSON ST., STE 605, MONTGOMERY, AL 36104  
 \_\_\_\_\_  
*(Name and Address of Defendant)*

THE COMPLAINT OR OTHER DOCUMENT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT, AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT OR OTHER DOCUMENT, WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE PLAINTIFF(S) OR ATTORNEY(S) OF THE PLAINTIFF(S),  
 SAM DAVID KNIGHT  
 \_\_\_\_\_  
*[Name(s) of Attorney(s)]*

WHOSE ADDRESS(ES) IS/ARE: 2001 Park Place North, Ste. 500, BIRMINGHAM, AL 35203  
 \_\_\_\_\_  
*[Address(es) of Plaintiff(s) or Attorney(s)]*

THE ANSWER MUST BE MAILED OR DELIVERED WITHIN 30 DAYS AFTER THIS SUMMONS AND COMPLAINT OR OTHER DOCUMENT WERE SERVED ON YOU OR A JUDGMENT BY DEFAULT MAY BE RENDERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT OR OTHER DOCUMENT.

**TO ANY SHERIFF OR ANY PERSON AUTHORIZED BY THE ALABAMA RULES OF CIVIL PROCEDURE TO SERVE PROCESS:**

☐ You are hereby commanded to serve this Summons and a copy of the Complaint or other document in this action upon the above-named Defendant.

☒ Service by certified mail of this Summons is initiated upon the written request of DOUGLAS KILLOUGH  
 pursuant to the Alabama Rules of the Civil Procedure. *[Name(s)]*

03/29/2023 /s/ JACQUELINE ANDERSON SMITH By: \_\_\_\_\_  
*(Date)* *(Signature of Clerk)* *(Name)*

☒ Certified Mail is hereby requested. /s/ SAM DAVID KNIGHT  
*(Plaintiff's/Attorney's Signature)*

**RETURN ON SERVICE**

☐ Return receipt of certified mail received in this office on \_\_\_\_\_  
*(Date)*

☐ I certify that I personally delivered a copy of this Summons and Complaint or other document to \_\_\_\_\_  
 \_\_\_\_\_ in \_\_\_\_\_ County,  
*(Name of Person Served)* *(Name of County)*

Alabama on \_\_\_\_\_  
*(Date)*

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*(Phone Number of Server)*





## NOTICE TO CLERK

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
DOUGLAS KILLOUGH ET AL V. FIVE GUYS OPERATIONS, LLC

01-CV-2023-901005.00

To: CLERK BIRMINGHAM  
clerk.birmingham@alacourt.gov

TOTAL POSTAGE PAID: \$8.58

Parties to be served by Certified Mail - Return Receipt Requested

FIVE GUYS OPERATIONS, LLC  
C/O CT CORPORATION  
2 N. JACKSON ST., STE 605  
MONTGOMERY, AL 36104

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Parties to be served by First Class Mail

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<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature <span style="float: right;"><input type="checkbox"/> Agent <input type="checkbox"/> Addressee</span></p> <p><b>X</b></p>	
<p>1. Article Addressed to:</p> <p><b>FIVE GUYS OPERATIONS, LLC</b>  <b>C/O CT CORPORATION</b>  <b>2 N. JACKSON ST., STE 605</b>  <b>MONTGOMERY, AL 36104</b></p>		<p>B. Received by (Printed Name)</p>	<p>C. Date of Delivery</p>
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<p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery</p> <p><input checked="" type="checkbox"/> Certified Mail®</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery</p> <p><input type="checkbox"/> Collect on Delivery</p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery</p>		<p><input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Registered Mail™</p> <p><input type="checkbox"/> Registered Mail Restricted Delivery</p> <p><input checked="" type="checkbox"/> Signature Confirmation™</p> <p><input type="checkbox"/> Signature Confirmation Restricted Delivery</p>	
<p>7022 1670 0001 4388 0041</p>		<p>all Restricted Delivery</p>	
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1. Addressee:

FIVE GUYS OPERATIONS, LLC  
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9590 9402 7940 2305 7011 76

2. Article Number (Transfer from shipping label)

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**RECIPIENT: COMPLETE THIS SECTION ON DELIVERY**

A. Signature

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CV-23-901005

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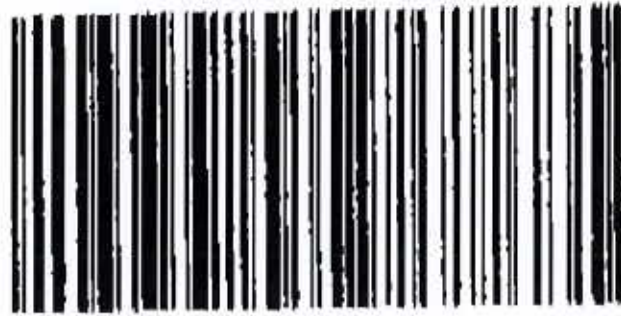
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